

Equal Pay Act and Recent Developments in EEO Law

Courtney R. Samford

Wyatt, Tarrant & Combs, LLP
250 West Main St., Suite 1600
Lexington, KY 40507

csamford@wyattfirm.com

Equal Pay in the News



“Female physicians do not work as hard.”



Historical Perspective



Where Are We Now?

- Institute for Women Policy Research states that pay equity will not reach parity until 2059
- Women make 80.5 cents on the dollar compared to men (20% gap)
- The pay gap is higher for African American and Hispanic women (Pew Research Center)
- Will take 106 years for pay parity for African American women and 215 for Hispanic women



- Gen-Xers have largest pay gap while Millennials have the lowest



Where Are We Now?

- Louisiana has the highest pay gap at \$15,238 (70% earnings ratio), New York has the lowest at \$5,766 (89% earning ratio)



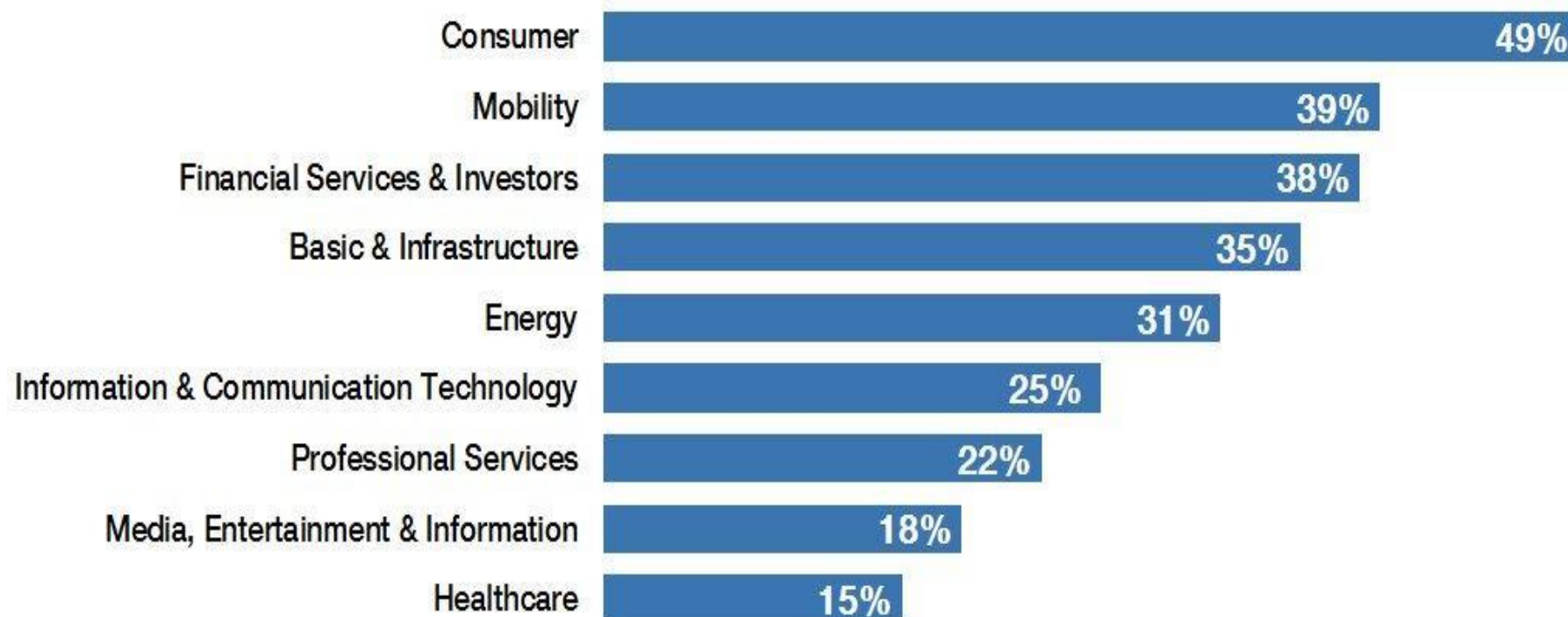
Where Are We Now?

- US ranks 49th on World Economic Forum's Global Gap Index (Gender Pay Inequality Report 2017)



The gender wage gap by industry

Based on the World Economic Forum's The Future of Jobs report, Industry Gender Gap Profiles



Source: World Economic Forum

Applicable Federal Laws

- Equal Pay Act
- Title VII
- Lilly Ledbetter
- Federal Contractors
- ADEA
- ADA

Equal Pay Act

- Men and women in the same workplace must be paid equal pay for equal work.
- Jobs must be “substantially equal” determined by job content.
- Substantially equal skill, effort, responsibility, working conditions
- No charge required.
- SOL is 2 years – or 3 if willful



Equal Pay for Equal Work

☐ Same Form of Pay

- ☐ EX: Employer cannot pay higher hourly wage to a male employee and then attempt to equalize the difference by periodically paying a bonus to a female employee.
- ☐ Wages must be equal across all forms of compensation including bonuses, stock, life insurance, profit sharing, vacation pay, gas allowances, travel expenses, and benefits.

☐ Jobs do not have to be identical. Must be substantially equal.

- ☐ EX: Look at actual job duties, not job titles or classifications. Do both jobs require the same skill, effort and responsibility?

EPA: How are Skills Measured?

“[F]actors such as the experience, ability, education and training required to perform a job.



Possession of a skill not needed to meet the requirements of the job should not be considered. For example, a hotel clerk alleges that he is paid less than a female who performs substantially equal work. He has a high school diploma while his female co-worker has a college degree.

However, performance of the two jobs requires the same education, ability, experience, and training. Therefore, the skill required to perform the two jobs is substantially equal. A college degree does not justify a higher salary because it is not needed to perform the job.”

- **Effort:** Amount of physical or mental exertion needed to perform job.
- **Responsibility** is usually defined as the degree of accountability required in performing a job. Factors to be considered in determining the level of responsibility in a job include:
 - Extent to which employee works without supervision,
 - Extent to which employee exercises supervisory functions, and
 - Impact of employee's exercise of his or her job functions on the employer's business.

- “Ordinarily, “**establishment**” means a physically separate place of business. However, given that many employees have virtual offices, the EEOC assesses whether the “establishment” is separate on a case-by-case basis.
- **Working conditions** usually consist of two factors:
 - Surroundings, and
 - Hazards.”
- Cannot lower male’s wages to make the wages comparable

Burden of Production Shifts to Employer to Prove Legitimate Business Reason for Disparity

■ EPA – Four Affirmative Defenses Identified:

- bona fide seniority system
- merit system
- system which measures earnings by quantity or quality of production or
- differential based on any factor other than sex.

29 USC § 206(d)(1).

Title VII, ADA and ADEA

- Prohibit employment discrimination on the basis of race, color, religion, sex, national origin, age or disability, including discrimination in compensation.
- Prohibit retaliation.



Differences between Title VII (and others) and EPA

- EPA – no EEOC charge requirement
 - Title VII requires charge be filed
- EPA – 2 year statute of limitations or 3 if willful
 - 180 or 300 days if a state or local agency enforces a law that prohibits employment discrimination on the same basis
- EPA – job must be substantially equal to that of the higher paid opposite sex employee and work in same establishment
 - Neither required for Title VII
- EPA – burden of proof (not persuasion) on employer to prove affirmative defense
- EPA – back pay, attorney's fees and liquidated damages (in amount of back pay)
 - Title VII – compensatory and punitive damages available

Examples of Compensation Discrimination from EEOC

“An employer pays an employee with a disability less than similarly situated employees without disabilities and the employer's explanation (if any) does not satisfactorily account for the differential.”



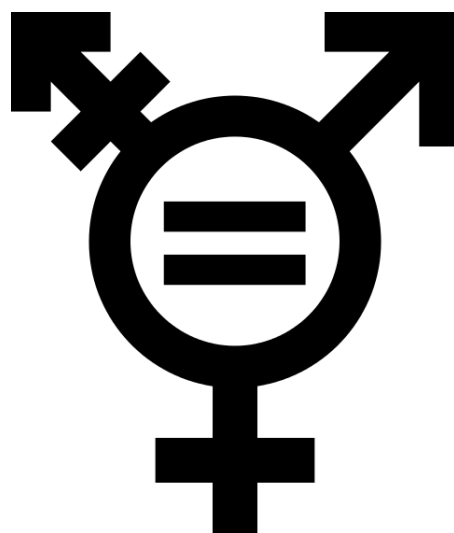
Examples of Compensation Discrimination from EEOC

“An employer sets the compensation for jobs predominately held by, for example, women or African-Americans below that suggested by the employer's job evaluation study, while the pay for jobs predominately held by men or whites is consistent with the level suggested by the job evaluation study.”

Examples of Compensation Discrimination from EEOC

- “An employer maintains a neutral compensation policy or practice that has an adverse impact on employees in a protected class and cannot be justified as job-related and consistent with business necessity. For example, if an employer provides extra compensation to employees who are the “head of household,” i.e., married with dependents and the primary financial contributor to the household, the practice may have an unlawful disparate impact on women.”

EEOC Litigation



Heritage Bank to Pay \$30,598 judgment in EPA case

- Female insurance sales associate claimed that she was paid the same as her female co-worker, but when a male was hired into the same position, he made 33% more than the females in the same position.
- Judgment requires bank to implement policies to prevent future EPA violations, annual anti-discrimination training, and semi-annual reporting to EEOC.



Judgment entered against Pizza Studio

- EEOC claimed that two high schoolers (one male and one female) applied for identical jobs. The male was paid \$.25 more per hour than the female.
- When the female called to complain about the disparity, the restaurant withdrew both offers of employment.
- Back pay, compensatory, punitive damages were awarded.
- Policy changes, training, data collection, and reports were also ordered.

Settlement for \$60,000 – Pay Disparity for Pharmacy

- Community Pharmacy allegedly paid female pharmacy tech \$4 less per hour and fired her for complaining about it.
- Pharmacy ordered to pay damages, as well as required to retain an external monitor to help company review and revise policies with regard to the EPA. Pharmacy also ordered to provide annual training for employees, supervisors and managers, and to report to EEOC.

More Settlements ...

- **Spec Formliners to Pay \$105,000 to Settle Title VII Lawsuit:** EEOC claimed that employer paid a female sales associate less in base pay and required her to sell more products to receive the same commission as her male co-worker.
- **Vador Ventures to Pay \$36,000 to Settle EPA and Title VII suit:** EEOC claimed that company paid a day porter a lower wage than her male counterpart for equal work and, once she complained, she was assigned additional work, subjected to verbal harassment and was eventually fired.

Recent Title VII Wage Disparity Cases

- Title VII wage disparity claim dismissed for failure to exhaust administrative remedies when plaintiff merely claimed that he was discriminated against relating to his termination. *See Golden v. Mirabile Investment Corp.*, 2018 WL 1168253 (6th Cir. 2018).
- Triable issue precluded summary judgment on whether employer terminated employee because she complained about wage disparity under Title VII. *See Mumm v. Charter Township of Superior*, 2018 WL 1136951 (6th Cir. 2018).

Recent EPA Cases

- Plaintiff failed to prove pretext once Defendant had proven its affirmative defense that Plaintiff was paid less because she chose a compensation scheme of a base salary plus benefits and her male counterpart chose commission solely. *Schleicher v. Preferred Solutions*, 831 F.3d 746 (6th Cir. 2016).
- Plaintiff failed to prove Defendant's affirmative defense was pretext where Defendant had reorganized its staff and salaries. *Boaz v. FedEx Customer Info. Servs., Inc.*, 668 Fed. Appx. 152 (6th Cir. 2016).

Shareholder Actions

- Shareholders have sued eBay, Inc., Intel Corp., Apple Inc., Amazon.com, Expedia Inc., Microsoft, and Adobe Inc. asking for companies to upgrade standards and increase transparency on gender pay disparity in the workplace.



Lilly Ledbetter

- Passed in 2009.
- Amends Title VII 180 day statute of limitations for filing charge for compensation discrimination - resets with each new violation.
- In response to *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007)



Federal Contractors

- OFCCP Regulation at 41 CFR Section 60-2.17(b)(3) require contractors to self evaluate their compensation systems for race, sex or ethnicity based inequalities.
- Does not specify how to evaluate.
- Can meet requirement without statistical analysis.

Trump Rolls Back Obama Fair Pay Executive Order

- 2014 Fair Pay Executive Order for government contractors required paycheck transparency and a ban on forced arbitration clauses for sexual harassment, sexual assault or discrimination claims.

EEO-1 Wage Data Stayed

- On August 29, 2017, the Office of Information and Regulatory Affairs stayed the EEOC's new EEO-1 form that added wages and hours information for employers over 100.
- OMB stated that it was concerned that some aspects lacked practical utility, was unnecessarily burdensome, and did not address privacy or confidentiality issues.

State Changes in EPA Laws

- Changes to EPA laws are attempting to further eliminate workplace discrimination surrounding pay based on gender.
- Federal and state laws that prohibit gender-based discrimination are already in place – these new laws are looking to extend their reach.
- California has made arguably the most significant changes, with states like New York, Maryland, and Massachusetts falling close behind.

Salary History Question Has Become History in Some States

- Theory is that income equality follows an applicant job to job if salary history is included as a question in the hiring process.
- Ex. If an employee starts out at a lower salary for the same job, then the employee will be making less all the way up the ladder.
- Mass. banned public and private employers from asking this question. Employer has to state the salary upfront. 6 other states have similar laws. KY does not have a similar law.



9th Circuit Holds Salary History Not Legitimate Reason to Pay Women Less

- 9th Circuit recently held that salary history cannot justify disparity under the EPA.
- Held that a “factor other than sex” is limited to a legitimate job – related factor like education, ability, prior job performance, experience.
- Court also held that pretext does not play a role in EPA cases.
- The defendant plans to appeal because there is a circuit split on whether this factor can be considered.

Should Salary History Be History?

- One commentator stated that candidates start experiencing your company culture the moment they apply for a job and asking for a salary history may not align with your company's culture of inclusivity.
- Amazon joined several other employers who have taken this question off of their applications.
- Supporters of these laws state that companies should be transparent about what the salary range is up front and rely upon market data and candidate's qualifications to set the range.
- In states where there is no law restricting this question, could open employer up to disparate impact claims?

17 States Have Pay Secrecy Laws

- Prohibit employers from retaliating against employees who discuss wages with co workers.



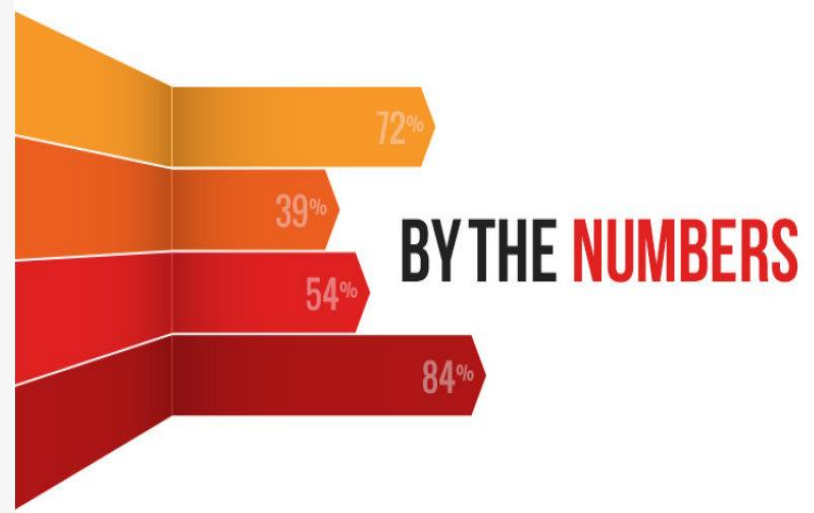
Best Practices

- Perform pay equity audits
- Do not ask for pay history
- Consider job categories and pay structures
- Examine policies and procedures about pay
- Education and train supervisors and hiring managers about discrimination and commitment to equal pay
- Consider pay transparency
- Document employment decisions that establish they are legitimate and non-discriminatory



2017 NUMBERS

- Retaliation – 41,097
- Race – 28,528
- Disability – 26,838
- Sex – 25,605
- Age – 18,376
- Sexual Harassment – 6,696 (\$46.3 million collected for victims)
- Equal Pay Act – 996



Kentucky 2017 vs. 2016



“The Commonwealth”

Total Charges	Race	State %	Sex	State %	Retaliation (all statutes)	State %
883/911	328/323	37.1%/35.5%	262/273	29.7%/30%	350/371	39.6%/40.7%

Legal Protections for LGBTQ Workers



EEOC v. R.G. & G.R. Harris Funeral Homes, Inc. (6th Cir. March 2018)

- Aimee Stephens worked as funeral director for almost 6 years
- Informed funeral home that she was transgender and planned to start dressing as female
- Fired 2 weeks later
- Case filed by EEOC



Harris Funeral Homes continued

- Trial court held that EEOC had proven sex discrimination (sex stereotyping only) but dismissed claim based on Religious Freedom Restoration Act exemption
- Sixth Circuit held that:
 - Sex stereotyping **and** transgender/transitioning are both protected classes under Title VII
 - RFRA not a defense because:
 - Requiring employer to comply with Title VII does not substantially burden employer's religious practices
 - Enforcement of Title VII is least restrictive way to further EEOC's interest of eliminating workplace discrimination

Evans v. Georgia Regional Hospital (11th Cir. March 10, 2017)

- Jameka Evans claimed that hospital harassed and punished her, and eventually forced her resignation as a security officer, because she is a lesbian
- 3-judge panel of 11th Circuit held that sexual orientation is not covered by Title VII



Zarda v. Altitude Express (2nd Cir. Feb. 2018)

- Donald Zarda claimed he was terminated for telling client that he was gay
- Alleged that Title VII and New York law prohibit sexual orientation discrimination
- Three judge panel disagreed and upheld existing law
- Estate appealed



Zarda continued

- Held that **sexual orientation is a subset of sex discrimination**
- “One cannot fully define a person’s sexual orientation without identifying his or her sex[.]”

Title VII and Sexual Orientation

Will continue to come to the Court until they decide to take it.





Did You Know?

- Opinion Letters are back at the DOL
- An employer can be sued for making a false statement during an unemployment hearing
- Employers can be held criminally liable for antitrust violations
 - anti-poaching
 - wage suppression

New Guidance on Interns

- “Primary beneficiary” test governs whether interns are actually employees under FLSA
- Must examine “economic reality” of the relationship to determine which party is the “primary beneficiary”
- Seven factors outlined in Fact Sheet #71

**U.S. Department of Labor
Wage and Hour Division**

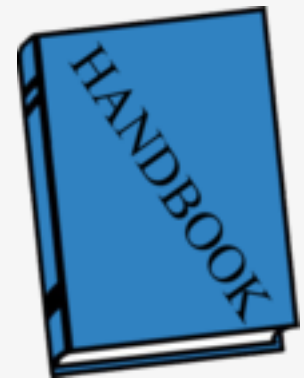


(Updated January 2018)

Fact Sheet #71: Internship Programs Under The Fair Labor Standards Act

NLRB and Employee Handbooks

- Previous standard -- *Lutheran Heritage* – would invalidate a handbook provision if employees “would reasonably construe” the policy to prohibit protected, concerted activity under the NLRA
- New standard – *Boeing* -- when evaluating a facially neutral provision that could interfere with NLRA rights, the NLRB will balance:
 - the nature and extent of the potential impact on NLRA rights
 - legitimate justifications for the rule



NLRB General Counsel guidance on handbooks

- Issued on June 6, 2018
- Category 1 – Rules that are generally lawful to maintain:
 - Civility rules
 - No-photography rules and no-recording rules
 - Rules against insubordination, non-cooperation, or on-the-job conduct that adversely affects operations
 - Disruptive behavior rules
 - Rules protecting confidential, proprietary and customer information or documents
 - Rules against defamation or misrepresentation
 - Rules against using employer logos or intellectual property

NLRB General Counsel guidance on handbooks (continued)

- Category 2 – Warrant individualized scrutiny:
 - Rules limiting disparagement or criticism of employer (as opposed to just civility rules regarding other employees)
 - Rules regarding use of employer's name (as opposed to employer's intellectual property)
 - Rules impacting off-duty conduct that might harm employer (as opposed to just insubordinate conduct at work)
- Category 3 – Unlawful to maintain:
 - Confidentiality rules regarding wages, benefits or working conditions
 - Rules against joining outside organizations or voting on matters concerning the employer

A Few Interesting Cases



Severson v. Heartland Woodcraft (7th Circuit)

- At end of 12-week FMLA leave, employee advised employer that he needed to have back surgery and would be off another two months.
- Employer terminated employment and told him he could reapply.
- On appeal, 7th Circuit held that long-term leave is not a reasonable accommodation because it does not allow an employee to perform the essential functions of the job
- BUT a short-term leave of a few days or weeks may be a reasonable accommodation

Hickey v. General Electric Company (Ky. 2017)

- Logan Hickey's employment with GE ended and he filed for unemployment
- Issue: Voluntary quit or discharge
- Following award of benefits, Hickey sued GE for damages for deprivation of benefits (KRS 466.070) and punitive damages
- Court found that KRS 466.070 creates a private right of action
- Take-away – Stick to the facts, no generalizations, document everything.

Take-Aways

- Update sexual harassment policy and provide live training every other year
- Guard against same sex discrimination claims
- Review payment practices to ensure pay parity
- Review arbitration agreements to see if they include class action waivers
- Update policies on interns
- Do not automatically deny a request for extended leave after FMLA exhaustion
- Utilize ADA interactive process

Marketplace Contractor – Not Employee Under Kentucky Law If

- Agrees in writing s/he is an independent contractor
- Does not have to be available during particular hours
- Is not prohibited from using any app, software, etc. by another marketplace contractor
- Is not restricted from engaging in any occupation or business
- Is responsible for bearing the expenses of performing the services



Questions?